



U.S. Department of Justice

Immigration and Naturalization Service

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OFFICE OF ADMINISTRATIVE APPEALS
425 Eye Street N.W.
ULLB, 3rd Floor
Washington, D.C. 20536

Public Copy

File: EAC 99 198 50448 Office: Vermont Service Center Date:

JAN 18 2001

IN RE: Petitioner:
Beneficiary:

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:

Identifying data removed to
prevent clearly unwarranted
disclosure of personal privacy

INSTRUCTIONS:


This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,
EXAMINATIONS


Mary C. Mulrean, Acting Director
Administrative Appeals Office

DISCUSSION: The nonimmigrant visa petition was denied by the Director, Vermont Service Center. The matter is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a company that negotiates leases with shopping malls to operate push carts during holiday seasons, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its executive director. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel argues that the "INS's determination that the beneficiary is not employed in an executive capacity is unsupported by the evidence and is clearly erroneous."

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization and seeks to enter the United States temporarily in order to continue to render his or her services to the same employer or a subsidiary or affiliate thereof in a capacity that is managerial, executive, or involves specialized knowledge.

8 C.F.R. 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The U.S. petitioner states that it was established in 1998 and that it is an affiliate of [REDACTED] located in India. The petitioner declares ten employees worldwide and a gross annual income worldwide of over \$200,000.00. It seeks to extend the petition's validity and the beneficiary's stay for one year at an annual salary of \$36,000.

At issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;
- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;
- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and
- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;
- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

The petitioner describes the beneficiary's duties as follows:

[The beneficiary's duties during the next twelve months will be concentrated on establishing licensing agreements with shopping malls and other outlet locations as well as negotiating contracts with retail and wholesale establishments for the sale of export items. As the retail outlets expand and retail and wholesale supply contracts are established, [the beneficiary will obtain the necessary equipment and hire additional personnel to manage and administer the business as well as staff the retail outlets.

In a letter dated June 24, 1999, the Service requested that the petitioner respond to the following:

You are requested to submit evidence that the beneficiary is acting "primarily" in an executive/managerial capacity. The most persuasive evidence clearly documents the beneficiary's actions in directing the organization and/or managing a subordinate professional staff. Your U.S. entity does not possess a sophisticated hierarchy of workers, middle management, and executive/managers to require the services of a bona fide LIA executive/manager.

Please submit a detailed breakdown of the time spent on what you consider to be each of the beneficiary's assigned executive/managerial duties.

You have not sufficiently described the beneficiary's duties to demonstrate that he/she is employed in a qualifying capacity.

Submit evidence of the staffing of the United States organization. Indicate the number of employees, the duties performed by each employee or each section, as well as the management and personnel structures of the United States firm.

In response to the request for additional information, the beneficiary's duties were further described as follows:

In furtherance of this business concept, [the beneficiary] as Executive Director, negotiated leases with two Malls for licenses for two push carts during the holiday season to survey the market. This was to test the market to see which products were in demand and were profitable. During this time, [the beneficiary] also contacted various wholesale and retail businesses to develop markets for wholesale imported gifts, ready made garments, jewelry, etc.

In addition, counsel stated that the beneficiary "has hired an Area Manager, a Management Consultant, an Assistant Manager, and four sales associates at present." Counsel further argues that the petitioning entity is "still in the stage of a new business according to 8 C.F.R. §214.2(l)(ii)(F), in that the company has been 'doing business' in the United States for less than one year."

In his decision, the director noted that:

It is stated that the beneficiary entered the United States in August 1998 then left to go to India in January 1999 and returned to the United States on March 7, 1999. Even though he left and then reentered, it does not mean that the business was not established and is a "new business" again.

On appeal, counsel provides the following description of the beneficiary's duties:

1. Set up the operational infrastructure for the company, open bank (sic) accounts, obtain insurance, hire personnel, and undertake all logistical arrangements to start up business, develop operational procedures and policies, etc.
2. Contact and negotiate with various retail and wholesale establishments in the United States to obtain supply contracts, as well as to introduce the services of the company.
3. Explore locations for mobile retail units in Massachusetts and other parts of the United States.

Negotiate and undertake necessary contractual and lease arrangements to operate the units in appropriate retail establishments.

4. Study the market and determine appropriate products to sell, determine quantity, source suppliers, and negotiate and enter into supply contracts.

5. Manage and provide direction to the overall operation of the company, including supervision of subordinate manager responsible for the operation of the retail units and sales staff, ensure financial integrity and viability of the company; establish subcontract for accounting and bookkeeping services, and ensure accounting, tax reporting and payments are done on a timely manner.

The information provided by the petitioner describes the beneficiary's duties only in broad and general terms. Although the petitioner's descriptions are lengthy, they are also repetitive, and there is insufficient detail regarding the actual duties of the assignment to overcome the objections of the director. Duties described as establishing licensing agreements with shopping malls, negotiating contracts with retail and wholesale establishments for the sale of export items, obtain necessary equipment, and staff the retail outlets are without any context in which to reach a determination as to whether they would be qualifying. Other duties such as studying the market and exploring locations for mobile retail units have not been demonstrated to be managerial or executive in nature. The use of the position title of "executive director" is not sufficient.

The record contains insufficient evidence to demonstrate that the beneficiary has been or will be employed in a primarily managerial or executive capacity. The petitioner has provided no comprehensive description of the beneficiary's duties that would demonstrate that the beneficiary has been or will be managing the organization, or managing a department, subdivision, function, or component of the company. The petitioner has not shown that the beneficiary has been or will be functioning at a senior level within an organizational hierarchy other than in position title.

Based on the evidence furnished, it cannot be found that the beneficiary has been or will be employed in a primarily managerial or executive capacity. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proving eligibility for the benefit sought remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

ORDER: The appeal is dismissed.